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86-252

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ALOHA AIRLINES, INC.

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether retroactive application of this Court's decision in Del Costello v. Teamsters, 462 U.S. 151 (1983) establishing a 6-month statute of limitations to a case arising under the Railway Labor Act, 45 U.S.C. §151 et seq. is precluded by this Court's decision in Chevron Oil Company v. Huson, 404 U.S. 97 (1971).

STATEMENT REQUIRED BY RULE 28.1

Aloha Airlines, Inc. is a wholly-owned subsidiary of Aloha, Inc. Aloha, Inc. has no parent company, and neither has any other wholly-owned subsidiaries nor ownership nor interests in any other company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 781 F.2d 1400 (9th Cir. 1986), and is reproduced in

the Appendix to this Petition (11a-68a). The opinion of the District Court is unreported and is reproduced in the Appendix (71a-85a).

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1986. Petitioner filed a timely petition for rehearing with a suggestion for rehearing en banc on February 20, 1986. The petition for rehearing was denied by order dated May 21, 1986, in which the Court of Appeals issued an amended opinion. The Court of Appeals' order is reproduced in the Appendix (1a-10a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION

Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b) provides in pertinent part:

> Provided, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

29 U.S.C. §160(b).

STATEMENT OF THE CASE

This case presents an issue which has split the Courts of Appeals: Whether to give retroactive effect to this Court's decision in

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). Although this case arises under the Railway Labor Act ("RLA") and not the National Labor Relations Act ("NLRA") this is a difference without a distinction for both applying the 6-month statute of limitations contained in Section 10(b) of the NLRA, 29 U.S.C. §160(b) and for doing so retroactively. Since the RLA does not contain its own statute of limitations for statutory violations,[1/] the federal interest

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1/ The RLA does contain a statute of limitations for actions brought to challenge an award of a System Board of Adjustment, 45 U.S.C. §153 (First) (r). The court in this case rejected its applicability to a action brought alleging contractual and statutory violations. (42a). Other Courts of

in uniformity has led to the adoption of the 6-month statute of limitations in Section 10(b) of the NLRA for both duty of fair representation actions and actions alleging other statutory breaches. The refusal of the Ninth Circuit to apply its decision in this case retroactively graphically conflicts with the decisions of the Second and Seventh Circuits, and is a further illustration of the conflict between the Ninth Circuit and other Courts of Appeals over the retroactive application of DelCostello.

1/ (Cont'd)
Appeals have rejected the 2-year statute of limitations of 45 U.S.C. §153 (First) (r) to breach of duty fair representation actions under the RLA, Sisco v. Consolidated Rail Corp., 732 F.2d 1188 (3d Cir. 1984).

On March 9, 1984 the IAM filed this action in the United States District Court for the District of Hawaii seeking declaratory and injunctive relief, and damages for Aloha's alleged breach of a collective bargaining agreement and violations of the RLA and an order compelling arbitration of alleged breaches of the contract. Aloha promptly filed a motion to dismiss and for sanctions contending alternatively that dismissal of the IAM's petition to compel arbitration in a prior case precluded the IAM from using that claim and other claims which could have joined with it,[2] or, in the

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2/ The prior action was brought by the IAM to compel Aloha to arbitrate a grievance it had filed over Aloha's refusal to alter rules, rates of pay

alternative, that the 1-year statute of limitations in H.R.S. Section 657-11[3] rendered the IAM's action

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2/ (Cont'd)
and working conditions during the status quo period mandated by Sections 5 and 6 of the RLA, 45 U.S.C. §155, 156. IAM v. Aloha Airlines, Inc., 776 F.2d 812 (9th Cir. 1985). The Ninth Circuit held that since the issue presently was purely statutory, exclusive jurisdiction over the IAM's claims rested with the federal courts.

3/ H.R.S. §657-11 Recoveries authorized by federal statute. Whenever any federal statute provides for an imposition of a civil penalty or liquidated damages or imposes a new liability or enlarges any existing liability and the statute does not specify the period within which suit to recover the penalty, liquidated damages, or any sum arising out of any new or enlarged liability may be brought, the suit, if brought in a state court, shall be commenced within one year from the date the cause of action arises or be thereafter barred.

untimely since it had been commenced more than one year after March 1, 1983, the date Aloha believed it accrued. The District Court treated Aloha's motion as a motion for summary judgment and dismissed the action on the grounds of res judicata, and did not breach the statute of limitations issue.[4/] The Ninth Circuit affirmed in part and reversed in part the District Court's grant of summary judgment, finding only that part of the IAM's second action which sought an order compelling arbitration precluded by the doctrine of res judicata, but holding that the IAM's

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4/ The District Court's opinion is not reported and is reprinted in the Appendix at 69a-83a.

other claims could not have been raised in the prior action and therefore were not barred. (23a-32a)

The court then addressed the statute of limitations issue, finding that the RLA did not contain its own statute of limitations for actions alleging a breach of a collective bargaining agreement and statutory violations, and that normally the most analogous state statute of limitations would be borrowed. Acknowledging that every Circuit which had addressed the issue had found that the federal limitations period in Section 10(b) of the NLRA, 29 U.S.C. §160(b) applied "with equal force" to actions brought under the RLA, the Ninth Circuit held that the IAM's action was governed by a 6-month statute of limitations

(45a). The Ninth Circuit found that the two other Circuits to address the specific issue in cases not alleging a breach of the duty of fair representation had agreed that the 10(b) limitations period governed. (45a-47a).[5/]

Although the court adopted the reasoning of DelCostello to an action arising under the RLA, it refused to apply its holding to extinguish the IAM's claims. Despite the fact that the Complaint in this

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5/ This conclusion had been reached by the Seventh Circuit in Brotherhood of Locomotive Engineers v. Atchinson, Topeka & Santa Fe Railroad Company, 768 F.2d 914 (7th Cir. 1985) and by the Second Circuit in Robinson v. Pan American World Airways, Inc., 777 F.2d 84 (2nd Cir. 1985).

case had been filed on March 9, 1984, nine months after DelCostello was decided by this Court, the Ninth Circuit consistent with earlier decisions refused to apply its decision retroactively.[6/] The Ninth Circuit relied upon this Court's decision in Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), as mandating an analysis of the three factors set forth therein. Conceding that retroactivity would promote the prompt resolution of labor disputes, the Ninth Circuit found that factor

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6/ In Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036 (9th Cir. 1983), cert. denied, 465 U.S. 1102, 104 S.Ct. 1599, 80 L.Ed.2d 130 (1984), the Court of Appeals had refused to apply the holding of DelCostello retroactively.

outweighed by the fact that its decision was establishing a new principle of law, and would produce inequitable results. (51a-52a).

The Ninth Circuit then proceeded to apply what it viewed as the most analogous state statute of limitations, that contained in H.R.S. Section 657-11[7] and found that although the IAM's cause of action accrued on March 1, 1983, the date on which the collective bargaining agreements terminated,[8] it was equitably tolled until June 24, 1983, the date on which Aloha notified

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7/ See n. 3, supra.

8/ International Association of Machinists v. Aloha Airlines, Inc., 776 F.2d 812, 816 (9th Cir. 1985).

notified the IAM that it would refuse to proceed to arbitration. (61a-62a) The court therefore reversed the district court's grant of summary judgment and ordered the case to proceed on the merits.

Since this Court announced its decision in DelCostello, the majority of the Courts of Appeals have held that it should be applied retroactively. The Ninth Circuit has consistently refused to apply DelCostello retroactively where the effect would be to shorten the applicable statute of limitations.[9/]

9/ The Ninth Circuit has however applied DelCostello retroactively where the effect is to lengthen the applicable statute of limitations. Glover v. United Grocers, Inc., 746 F.2d 1380 (9th Cir. 1984), cert.

The Ninth Circuit's opinion clearly conflicts with this Court's decision in DelCostello where it applied its ruling retroactively to extinguish one of the claims before it, and decisions by the First, Second, Third, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits.[10/] Exacerbating the

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9/ (Cont'd)
denied ___ U.S. ___, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985).

10/ The Tenth Circuit in Jones v. Consolidated Freightways Corp. of Delaware, 776 F.2d 1458 (10th Cir. 1985) refused to apply DelCostello retroactively although it had already done so in Barnett v. United Airlines, Inc., 735 F.2d 358 (10th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 594, 93 L.Ed.2d 703 (1984). The Fourth Circuit has also been inconsistent in its retroactive application of DelCostello. Compare Triplett v. Brotherhood of Railway, Airline and Steamship Clerks, 763 F.2d 625 (4th Cir. 1985) (refusing to apply DelCostello retroactively) with Murray v. Branch Motor Express Company, 723 F.2d 1146 (4th Cir.

conflict is the fact that the Sixth Circuit and the Second Circuit, in most cases, have rejected the need to apply the factors set forth in this Court's decision in Chevron Oil Company v. Huson, supra, in determining whether to apply DelCostello retroactively.[11/] This

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10/ (Cont'd)
1983), cert. denied, ___ U.S. ___, 105 S.Ct. 292, 83 L.Ed.2d 228 (1984) (applying DelCostello retroactively).

11/ The Sixth Circuit has adhered to its opinion in Smith v. General Motors Corp., 747 F.2d 372 (6th Cir. 1984) (en banc); e.g. Miller v. Jeep Corp., 774 F.2d 111 (6th Cir. 1985). The Second Circuit originally rejected the need to discuss Huson in Welyczko v. U.S. Air, Inc., 733 F.2d 239 (2nd Cir. 1984), cert. denied ___ U.S. ___, 105 S.Ct. 512, 83 L.Ed.2d 402 (1984), but has recognized an "exception" in Byrne v. Buffalo Creek Railroad Company, 765 F.2d 364 (2nd Cir. 1985) for cases where there has been a decision on the merits.

conflict will remain unresolved and defeat one of the policies underpinning this Court's decision in DelCostello -- uniformity -- until it is addressed by this Court. Moreover, the fact that the Courts of Appeals themselves have been internally inconsistent underscores the need for a final resolution of the issue of whether DelCostello should be applied retroactively.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN DELCOSTELLO AND DECISIONS OF OTHER COURTS OF APPEALS

A.

THIS COURT APPLIED DELCOSTELLO RETROACTIVELY

In DelCostello this Court observed that the practice of

borrowing the most analogous state statute of limitations where a federal statute does not provide a limitations period may "be unsatisfactory vehicles for the enforcement of federal law." 462 U.S. at 161. Recognizing the need for prompt resolution of labor disputes, a principle firmly rooted in federal labor law policy, and the parallels between the breach of duty of fair representation and an unfair labor practice, this Court embraced the 6-month statute of limitations in Section 10(b) of the NLRA as governing actions brought by an employee under Section 301 of the Labor Management Relations Act [12/] for the union's breach of its duty of fair

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12/ 29 U.S.C. §185(a).

representation and the employer's breach of the collective bargaining agreement. The Court's holding was applied to one of the two plaintiffs before it, reversing the Court of Appeals' application of a state 3-year statute of limitations for malpractice actions ordering dismissal of the claim.[13/]

In United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981), overruled by DelCostello v. International Brotherhood of Teamsters, this Court selected the

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13/ United Steelworkers of America v. Flowers, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). The Second Circuit had applied a New York statute of limitations for malpractice actions and found the complaint timely.

state statute of limitations for vacating arbitrations award as the most analogous limitations period and overturned the Court of Appeals' selection of a six year statute of limitations period. The effect of the Court's decision was to extinguish the employee's claim, and it did so without discussing Huson.

In Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), this Court declined to retroactively apply its decision substituting a state statute of limitations for a federal statute. This Court identified three factors; first, whether the decision established a new principle of law, second, whether retroactive application will advance or retard the

new ruling's effect, and third whether retroactive application would produce "substantial inequitable results". 404 U.S. at 107 quoting Cypriano v. City of Houma, 395 U.S. 701, 706, 89 S.Ct. 1897, 23 L.Ed.2d 647, 652 (1969).

This Court did not discuss Huson in DelCostello finding no bar to retroactively using the 6-month statute of limitations to extinguish one of the claims before it.[14/] Thus, the Huson factors have no application where a federal statute of limitations is borrowed to promote

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14/ Justice O'Connor in dissent observed that she would continue to apply United Parcel Service, Inc. v. Mitchell and that "it is quite appropriate to apply Mitchell retroactively." citing Huson. 462 U.S. at 175 n. 2, 103 S.Ct. 2281, 76 L.Ed.2d at 496 n. 2.

uniformity and the rapid resolution of labor disputes, policies central to both the NLRA and the RLA.

Even if the Ninth Circuit properly determined that the Huson factors were applicable their application did not foreclose retroactivity. First, the only applicable precedent, a decision by the District Court, borrowed the 1-year statute of limitations under H.R.S. Section 657-11, a limitations period exclusively for federal causes of actions.[15/] The Ninth Circuit's conclusion that the IAM could not have foreseen the application of

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15/ Hafer v. Airline Pilots Association, 525 F.Supp. 874 (D.Hawaii 1981), affirmed without opinion 698 F.2d 1230 (9th Cir. 1983).

DelCostello to cases under the RLA is undercut by the fact that the Courts of Appeals were quick to apply DelCostello to actions arising under the RLA.[16/]

Indeed, the Ninth Circuit in Barina v. Gulf Trading and Transportation Company, 726 F.2d 560, 563-6 (9th Cir. 1984) characterized the distinction between the RLA and NLRA as "without import" for the purposes of applying a federal limitations period.

16/ Barnett v. United Airlines, Inc., 738 F.2d 358 (10th Cir. 1984); cert. denied ___ U.S. ___, 105 S.Ct. 594, 83 L.Ed.2d 703 (1984); Sisco v. Consolidated Rail Corp., 732 F.2d 1188 (3d Cir. 1984); Welyczko v. U.S. Air, Inc., 733 F.2d 239, 2nd Cir. 1984), cert. denied ___ U.S. ___, 105 S.Ct. 512, 83 L.Ed.2d 402 (1984).

Second, the Ninth Circuit acknowledged that retroactive application of its decision would promote the prompt resolution of labor disputes but concluded that to do so would be inequitable. But the only reason a retroactive application of DelCostello would have extinguished the IAM's claims was its inaction after its first action has been dismissed, hardly the basis for a finding of inequity.[17/]

17/ The IAM's first attempt to compel arbitration was denied on October 25, 1983. (17a) This action was not filed until almost five months later - March 9, 1984.

B.

THE NINTH CIRCUIT STANDS ALONE IN REFUSING TO APPLY DELCOSTELLO RETROACTIVELY TO BAR A CLAIM

The Sixth Circuit has applied DelCostello retroactively without engaging in a Huson analysis. Smith v. General Motors Corp., 747 F.2d 372 (6th Cir. 1984). The Second Circuit originally rejected the need to discuss Huson in Welyczko v. U.S. Air, Inc., 733 F.2d 239 (2nd Cir. 1984), cert. denied ___ U.S. ___, 105 S.Ct. 512, 83 L.Ed.2d 402 (1984), but has created an exception, Byrne v. Buffalo Creek Railway Company, 765 F.2d 364 (2nd Cir. 1985), where it both embraced a Huson analysis and refused to apply DelCostello retroactively.

The First Circuit, applying a Huson analysis, has found DelCostello to be retroactive. Graves v. Smith Transfer Corp., 763 F.2d 819 (1st Cir. 1984). The Third Circuit has taken an identical approach. Perez v. Dana Corp., Parish Frame Division, 718 F.2d 581 (3d Cir. 1983); Sisco v. Conrail, 732 F.2d 1188 (3d Cir. 1984) (applying Perez to case under RLA).

The Fourth Circuit has refused to apply DelCostello retroactively to a breach of duty of fair representation action arising under the RLA in Triplett v. Brotherhood of Railway, Airline and Steamship Clerks, 763 F.2d 625 (4th Cir. 1985) and to a case under the NLRA, Zemonick v. Consolidation Coal Company, 762 F.2d 381 (4th Cir. 1985),

but did apply DelCostello retroactively in Murray v. Branch Motor Express Company, 723 F.2d 1146 (4th Cir. 1983), cert. denied ___ U.S. ___, 105 S.Ct. 292, 83 L.Ed.2d 228 (1984); Sine v. Local 992, International Brotherhood of Teamsters, 730 F.2d 964 (4th Cir. 1984) (same).

The Seventh Circuit has applied DelCostello retroactively after analyzing the Huson factors. Landahl v. PPG Industries, 746 F.2d 1312 (7th Cir. 1984) (NLRA); United Independent Flight Officers v. United Airlines, Inc., 756 F.2d 1262 (7th Cir. 1985) (RLA). An identical result was reached by the Eighth Circuit in Lincoln v. District Nine, International Association of

Machinists, 723 F.2d 627 (8th Cir. 1983) (NLRA); Hunt v. Missouri Railroad, 729 F.2d 578 (8th Cir. 1984) (RLA) and by the Eleventh Circuit in Rogers v. Lockheed Georgia, 720 F.2d 1247 (11th Cir. 1983), cert. denied ___ U.S. ___, 105 S.Ct. 292, 83 L.Ed.2d 227 (1984) (NLRA).

The Tenth Circuit has applied DelCostello retroactively in an action arising under the RLA in Barnett v. United Airlines, Inc., 738 F.2d 358 (10th Cir. 1984), cert. denied ___ U.S. ___, 105 S.Ct. 594, 83 L.Ed.2d 703 (1984), but has refused to do so in a case arising under the NLRA on the basis of Huson. Jones v.

Consolidated Freightways Corp., 776 F.2d 1458 (10th Cir. 1985).[18/]

The Courts of Appeals are in unison that the 10(b) statute of limitations selected in DelCostello for cases under the NLRA applies with equal force to cases arising under the RLA. In declining to give DelCostello retroactive effect in this case, the Ninth Circuit did not articulate any distinction between cases arising under the RLA and under the NLRA, but rather ruled on its prior decisions

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18/ The only Court of Appeals that has not addressed this issue is the District of Columbia Circuit. However, the District Court for the District of Columbia has applied DelCostello retroactively after discussing Huson. Goins v. Teamsters Local 639, 598 F.Supp. 1151 (D.C. 1984).

which contained an analysis of the Huson factors.[19/] Thus, the conflict between the Ninth Circuit and the other circuits presents a question of federal labor policy common to actions under the NLRA and the RLA. The Ninth Circuit stands alone in uniformly refusing to apply DelCostello retroactively where the effect would be to shorten the applicable statute of limitations and bar the claim.

The Ninth Circuit's decision directly conflicts with the decisions of the two other Courts of Appeals

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19/ E.g. Edwards v. Teamsters Local 36, 719 F.2d 1036 (9th Cir. 1983), cert. denied 465 U.S. 1102, 104 S.Ct. 1599, 80 L.Ed.2d 130 (1984); Barina v. Gulf Trading and Transportation Company, 726 F.2d 560 (9th Cir. 1984).

which have applied DelCostello retroactively to cases presenting pure statutory actions under the RLA. In Brotherhood of Locomotive Engineers v. Atchinson, Topeka & Santa Fe Railway Company, 768 F.2d 914 (7th Cir. 1985), the Seventh Circuit applied DelCostello to claims brought under Section 2 (First) of the RLA, 45 U.S.C. §152 (First) reasoning that such claims are analogous to an employer's refusal to bargain under Section 8(a)(5) of the NLRA.[20/] Although there was no express discussion of retroactivity the Seventh Circuit observed "This suit was brought in 1982, which was too late to complain about a refusal to

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20/ 29 U.S.C. §158(a)(5).

bargain in 1972." 768 F.2d at 919. The Seventh Circuit had already applied DelCostello retroactively to a duty of fair representation action brought under the RLA. United Independent Flight Officers, Inc. v. United Airlines, Inc., 756 F.2d 1262 (7th Cir. 1985).

The Second Circuit applied DelCostello to an action brought under Section 2 (Fourth) of the RLA, 45 U.S.C. §152 (Fourth) in Robinson v. Pan American World Airways, Inc., 777 F.2d 84 (2nd Cir. 1985). Without discussion the Second Circuit found DelCostello applicable to an action which had accrued in 1982 but remanded the proceeding to the District Court to rule on the plaintiffs' claims of equitable tolling. However, nothing

in the Second Circuit's opinion intimates that its decision would not be applied retroactively.

The conflict of the Ninth Circuit's decision with the other Courts of Appeals is most graphically presented in Brotherhood of Locomotive Engineers and Robinson v. Pan Am, but is indicative of a much larger conflict between the Circuits and within the Circuits themselves on whether to apply DelCostello retroactively, whether to employ the Huson analysis, and whether retroactivity is appropriate in some cases but not all. This conflict has raged since DelCostello was decided, has spread to cases under the RLA, and is now ripe for resolution.

II.

THIS COURT MUST FINALLY
ADDRESS AN IMPORTANT
ISSUE OF FEDERAL LABOR POLICY

Although it has had the opportunity, this Court has refused to resolve the conflict between the Circuits concerning the retroactive application of DelCostello.[21/] The anomaly created by the Ninth Circuit's refusal to apply DelCostello retroactively except where it would lengthen the statute of limitations

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21/ See Justice White's dissent from the denial of certiorari in Greyhound Lines, Inc. v. Wilhite, ____ U.S. ____, 106 S.Ct. 280, 88 L.Ed.2d 244 (1985) and Saville v. Westinghouse Electric Corp., ___ U.S. ___, 106 S.Ct. 280, 88 L.Ed.2d 245 (1985), in which he observed that the conflict both in the retroactive application of DelCostello, and in the applicability of Huson warranted this Court's attention.

destroys the principle of uniformity, one of the foundations of this Court's decision in DelCostello. Further, the prompt resolution of labor disputes, another underpinning of DelCostello, is ill-served by having different statutes of limitations for the same cause of action depending on the situs of the dispute.

This Court will soon resolve another issue posed by DelCostello; whether application of the 6-month statute of limitations of Section 10(b) of the NLRA requires that the complaint both be filed and served within six months in order to be timely.[22/] This Court's resolution

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22/ Compare West v. Conrail, 780 F.2d 361 (3rd Cir. 1985), cert. granted, ___ U.S. ___, 54 U.S.L.W. 3859 (June 30, 1986) (complaint

of that issue will inevitably spawn another debate among the Courts of Appeals whether it should be applied retroactively. This Court should utilize this opportunity to finally resolve the retroactive application of DelCostello.

The fact that the Courts of Appeals cannot agree among themselves whether DelCostello should be retroactively applied, and are internally inconsistent underscores the need for a definitive resolution

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22/ (Cont'd)
alleging duty of breach of fair representation must be filed and served within six months) with Macon v. ITT Continental Baking Co., 779 F.2d 1166 (6th Cir. 1985) (contra).

of this issue.[23/] The factors that have led the Courts of Appeals to borrow the 10(b) statute of limitations for cases arising under the RLA, uniformity and the prompt resolution of labor disputes have been undercut by their array of approaches to retroactivity. The time has come to resolve this conflict.

CONCLUSION

For the foregoing reasons this Court should resolve the conflict

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23/ E.g. Byrne v. Buffalo Creek Railroad Company, 765 F.2d 364 (2nd Cir. 1985) (fact that case had advanced to trial on the merits precluded retroactive application of DelCostello); Triplett v. Brotherhood of Railway, Airline, and Steamship Clerks, 763 F.2d 625 (4th Cir. 1985). (Existence of prior decisions applying five year state statute of limitations defeated retroactively).

among the Courts of Appeals concerning the retroactive application of DelCostello, grant the Petition for a Writ of Certiorari, and reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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August 19, 1986

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,	)	No. 84-2693
	)	D.C. No. CV 84-0239
Plaintiffs-Appellants,	)	O R D E R
vs.	)	
ALOHA AIRLINES, INC.,	)	
Defendant-Appellee.	)	

Appeal from the United States
District Court for the
District of Hawaii
Harold M. Fong, District Judge,
Presiding

Argued and submitted
November 14, 1985
Honolulu, Hawaii

Filed February 6, 1986

Before: SKOPIL, FLETCHER, and

ALARCON, Circuit Judges.

The court's Opinion in this case filed February 6, 1986 is amended as follows:

Insert footnote 3 on page 21 of the slip opinion, line 3, (at end of sentence) [781 F.2d at 1411, last sentence of first paragraph continuing from page 1410]:

[3] Unlike the instant case, neither Butler nor Smart involved a claim primarily founded upon a statutory violation; the claims in both cases were grounded in the collective bargaining agreement. Nevertheless, the equitable tolling doctrine which the Eighth and Sixth Circuits employed to avoid penalizing the litigants for

exhausting their arbitral remedies under their collective bargaining agreements is applicable in the instant case because until June 24, 1983, the IAM believed that its claim was a minor dispute primarily founded upon the collective bargaining agreement and thus was arbitrable. Although on March 10, 1983 Aloha asserted that the dispute was not grievable, it was not until June 24, 1983 that Aloha spelled out the detail of its position that the IAM's complaint was a major dispute litigable in the federal courts.

Insert footnote 4 on page 21 of the slip opinion, line 6 (at end of the sentence ending with the word "agreement") [781 F.2d at 1411, after first sentence in first full paragraph]:

> The IAM's belief that the instant case presented a minor dispute was reasonable as a matter of law. Contrary to Aloha's contentions, the law was far from clear regarding whether the determination of the status quo under the RLA was a major dispute involving an interpretation of the Act or a minor dispute implicating an interpretation of the parties' collective

bargaining agreement. In the predecessor case to the instant appeal, another panel of this court noted that "the IAM's argument [that this was a minor dispute] has intuitive appeal." IAM v. Aloha Airlines, 776 F.2d at 816. Although the panel ultimately concluded that a determination of the status quo is a major dispute over which the federal courts have jurisdiction, see id., it considered the question to be sufficiently novel to warrant publication.

We note that the application of the tolling doctrine to future actions of

this type will be extremely limited. In light of our decision in IAM v. Aloha Airlines, Inc., 776 F.2d 812, that the determination of status quo under the RLA is a major dispute which is not arbitrable, a party in the IAM's position can no longer contend in good faith that its grievance relating to status quo is arbitrable. Thus, pursuit of arbitral remedies available under a collective bargaining agreement would not operate to toll the statute of limitations on a status quo claim under the RLA accruing after the date of our

decision in IAM v. Aloha Airlines, Inc., 776 F.2d 812. See International Union of Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229, 238 (1976) (filing of grievance under collective bargaining agreement does not toll limitations period applicable to statutory claim of racial discrimination before the Equal Employment Opportunity Commission).

Delete the last sentence in the first full paragraph on page 21 of the slip opinion [781 F.2d at 1411] ("Because this date . . . ."), and substitute the following:

The complaint was filed on March 9, 1984. That date is less than one year after June 24, 1983. Therefore, the IAM's action was timely filed.[5]

Footnote 5 will read as follows:

[5] Aloha contends that a remand to the district court is required in order to develop the facts concerning the IAM's four-month delay in filing this action following the district court's October 25, 1983 grant of partial summary judgment in Aloha's favor in the prior lawsuit. We disagree. Under the unique circumstances of this case, application of the

equitable tolling doctrine presents a question which we are able to resolve as a matter of law: whether the IAM's belief that the instant case presented a minor dispute was reasonable under then-existing case law. In light of our conclusion that the IAM's cause of action did not accrue until June 24, 1983, filing would have been timely until June 24, 1984; any delay in filing within that period is irrelevant.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,	)	No. 84-2693
	)	D.C. No. CV 84-0239
Plaintiffs-Appellants,	)	A M E N D E D O P I N I O N
vs.	)	
ALOHA AIRLINES, INC.,	)	
Defendant-Appellee.	)	

Appeal from the United States
District Court for the
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Harold M. Fong, District Judge,
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Argued and submitted
November 14, 1985
Honolulu, Hawaii

Filed February 6, 1986

Before: SKOPIL, FLETCHER, and

ALARCON, Circuit Judges.

ALARCON, Circuit Judge:

The International Association of Machinists and Aerospace Workers (hereinafter IAM) appeals from the district court's order granting summary judgment in favor of Aloha Airlines, Inc. (hereinafter Aloha), on the IAM's complaint for declaratory relief and damages for breach of the collective bargaining agreement and for violations of the "status quo" provisions of the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188 (1982). This case presents a question of first impression in this circuit: what statute of limitations is applicable to an action for breach of a collective bargaining agreement and for violations of the "status quo" provisions of the RLA? We conclude that principles of res judicata bar

relitigation in this action of IAM's request for compulsory arbitration. However, IAM's requests for declaratory relief and damages for breach of the collective bargaining agreement and for breach of the RLA's status quo provisions are not barred as they have not been litigated previously. We further find that the instant action was timely filed within the limitations period then applicable.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Aloha, a common carrier under section 201 of the RLA, 45 U.S.C. §181 (1982), entered into a collective bargaining agreement with the IAM on December 6, 1979 (the Basic Agreement). Article XXIII of the Basic Agreement provided that the agreement would remain in force

through December 31, and would renew itself each year unless a notice of intended change was served by one of the parties.

As a result of financial difficulties within the airline industry during 1981-82, the IAM agreed to temporary wage and benefit concessions in an Interim Agreement which became effective on April 2, 1982 and was incorporated into the Basic Agreement. The Interim Agreement provided that the concessions would be effective only through February 28, 1983, and that on March 1, 1983, the Basic Agreement would renew itself without change unless either party filed a notice of intended change.

On December 30, 1982, the IAM served a notice of intended change on Aloha, proposing modifications in the Basic Agreement. The parties commenced bargaining in January 1983. They reached an impasse, and the dispute moved into mediation pursuant to section 5 of the RLA, 45 U.S.C. §155 (1982). On February 11, 1983, Aloha advised the IAM that the terms of the Interim Agreement would continue in effect beyond March 1, 1983 and until further notice. The IAM filed grievances with Aloha on behalf of the clerical and mechanical units concerning Aloha's proposal to continue paying wages and benefits in accordance with the Interim Agreement. The grievances were processed to a deadlock under the

grievance procedure set forth in Article XV of the collective bargaining agreement. On June 24, 1983, Aloha notified the IAM by letter that it refused to submit the dispute to arbitration pursuant to Articles XV and XVI of the collective bargaining agreement because it was a major dispute which was not subject to binding arbitration under the RLA. Aloha relied upon the status quo provisions of the RLA, which require both parties to a collective bargaining agreement to preserve the status quo after service of a notice of intended change until a new agreement is reached or the RLA's mediation procedures have been exhausted. See 45 U.S.C. §§155, 156 (1982).[1]

The IAM filed an action in Hawaii state court on July 27, 1983 to compel arbitration of the dispute. Aloha removed the action to federal court on the grounds that it was a dispute arising under the RLA, and counterclaimed for declaratory and injunctive relief. Aloha also filed a motion for partial summary judgment on the issue of compelling arbitration. The district court granted Aloha's motion for partial summary judgment and denied the IAM's petition to compel arbitration on October 25, 1983. This court affirmed the district court's judgment on the IAM's interlocutory appeal. IAM v. Aloha Airlines, Inc., 776 F.2d 812, 816 (9th Cir. 1985).

On March 9, 1984, the IAM filed a second complaint in district court on behalf of the clerical and mechanical employees, seeking declaratory relief and damages for breach of contract and for violations of the status quo provisions of the RLA. The complaint also seeks an order to arbitrate the dispute. Aloha filed a motion to dismiss the entire action on res judicata grounds and for sanctions. The district court treated Aloha's motion as a summary judgment motion and granted it on the grounds that the previous ruling on the petition to compel arbitration was res judicata of the second action for declaratory relief and damages. Aloha's motion for sanctions was denied.

II. STANDARD OF REVIEW

We review the district court's grant of summary judgment de novo. Grigsby v. CMI Corp., 765 F.2d 1369, 1373 (9th Cir. 1985). We apply the same standard as that employed by the trial court under Fed. R. Civ. P. 56(c): we will affirm only if the record, read in the light most favorable to the non-moving party, reveals no genuine issues of material fact and establishes that the moving party is entitled to judgment as a matter of law. Id.

III. RES JUDICATA

Under the doctrine of res judicata, a final judgment on the merits precludes relitigation of claims which were or could have been raised in a prior action. Amaro v.

Continental Can Co., 724 F.2d 747, 749 (9th Cir. 1984). All issues that were litigated or that might have been litigated as part of the prior cause of action are barred. Los Angeles Branch NAACP v. Los Angeles Unified School District, 750 F.2d 731, 737 (9th Cir. 1984) (en banc), cert. denied, 106 S.Ct. 247. The IAM contends that the district court's grant of partial summary judgment in the prior action was not a judgment "on the merits" of the present dispute so as to preclude relitigation of claims which were or could have been raised in that action. Instead, the IAM argues that the district court's ruling that the dispute was not arbitrable was a jurisdictional ruling.

The district court's memorandum opinion in the prior action addresses the question whether the IAM's grievance involved a minor dispute subject to arbitration under the parties' collective bargaining agreement, or a major dispute involving the application of the status quo provisions of the RLA. The district court in the prior action did not purport to resolve the primary question raised by the instant complaint: whether Aloha's refusal to reinstate the terms of the Basic Agreement violates the collective bargaining agreement and the status quo provisions of the RLA. On the IAM's interlocutory appeal in the prior action another panel of this court determined that the dispute was

a major dispute not subject to arbitration. IAM v. Aloha Airlines, Inc., 776 F.2d at 816. The court viewed the case as raising only the narrow question whether the dispute was arbitrable, and expressly refused to resolve on appeal the terms and conditions of employment which should apply during the status quo period under the RLA. Id. at 816-17.

Because this court's resolution of the IAM's previous action settled the question whether the IAM's grievance was arbitrable, the IAM's request in its second complaint for an order compelling arbitration is barred by the doctrine of res judicata. The remainder of the IAM's second action, however, is not barred by res judicata principles.

The merits of the dispute -- whether Aloha's refusal to reinstate the terms of the Basic agreement violates the collective bargaining agreement and the status quo provisions of the RLA -- were not actually litigated in the prior action to compel arbitration.

The claims raised by the IAM in the instant case could not have been raised in the prior action. When faced with a petition to compel arbitration, a court's role is limited to "'ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.'" United Food & Commercial Workers Union v. Alpha Beta Co., 736 F.2d 1371, 1374 (9th Cir. 1984) (quoting United Steelworkers v. American Manufacturing Co., 363 U.S.

564, 567-68 (1960)). The court neither resolves the underlying factual controversy nor weighs the relative merits of the parties' claims. URS Co.-Kansas City v. Titus County Hospital Dist., 604 F.Supp. 423, 424 (W.D. Mo. 1985).

Aloha nevertheless contends that the IAM should have joined its motion to compel arbitration and its claim for declaratory relief and damages in a single action, and argues that the IAM gambled and lost by deliberately splitting its cause of action. Aloha's argument is meritless. Applying the standard enunciated by this court in Costantini v. Trans World Airlines, 681 F.2d 1199 (9th Cir.), cert. denied, 459 U.S. 1087 (1982), we find

that the two actions involve different claims. In Costantini, we established the following criteria for determining whether successive lawsuits involve a single cause of action:

> "(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts." Harris v. Jacobs, 621 F.2d 341, 343 (9th Cir. 1980). The last of these criteria is the most important. Id.

Costantini, 681 F.2d at 1201-02 (footnote omitted).

The instant action and the prior action do share a common nucleus of underlying facts. We are

persuaded, however, that it would be inequitable to require a party to simultaneously assert that the federal courts lack jurisdiction over a dispute because it is a minor dispute subject to arbitration, and that the federal courts have jurisdiction to resolve the merits of the dispute because it is a major dispute governed by the RLA. Moreover, the remaining criteria circumscribing the boundaries of a single claim are not met. Prosecution of the second action would not impair Aloha's right to have the dispute resolved under the RLA in federal court rather than by an arbitrator; in fact, it would further that right. The question whether different evidence would be required does not offer any guidance in the

context of the instant case because the facts are not in dispute: the sole questions raised by both actions are legal in character rather than factual.

Finally, the two actions allege the infringement of different rights. In the first action, the IAM sought to vindicate Aloha's alleged infringement of its contractual right to arbitration. In the second action, the IAM seeks to enforce its statutory right to require Aloha to maintain the status quo during mediation of their bargaining dispute. Not only would it be inequitable to require a party to a collective bargaining agreement to consolidate in a single action a request for arbitration and a contradictory request for adjudication

of the underlying dispute by the court, but such a requirement would destroy the utility of a petition to compel arbitration.

Aloha's reliance on Towers, Perrin, Forster & Crosby, Inc. v. Brown, 732 F.2d 345 (3d Cir. 1984) is misplaced. In Towers, Brown filed an action in state court requesting interpretation of noncompetition and forfeiture provisions in a contract and seeking a declaratory judgment. Id. at 346-47. Towers answered and filed a petition to compel arbitration pursuant to the California Arbitration Act. Id. at 347. The superior court denied the petition to compel, and its ruling was ultimately affirmed on appeal. Id. While the appeal was pending, Towers filed a second

petition to compel arbitration pursuant to the Federal Arbitration Act in federal court, which the district court granted. Id.

The Third Circuit reversed, finding that res judicata barred the pending case because the California court had already ruled on the motion to compel arbitration. Id. at 348. The court reasoned that the two actions sought exactly the same relief -- arbitration -- and opined that Towers could not split its cause of action by gambling that it would win on a state law theory, and when it lost, seeking to assert a federal theory which it had apparently held in reserve. Id. at 348, 351.

Towers is readily distinguishable from the instant case,

where the second action is not another motion to compel arbitration on a different legal theory, but instead seeks to litigate the merits of the dispute. Indeed, Towers provides support for the IAM's argument that the merits of a dispute arguably subject to arbitration constitute a separate claim from the claim that the dispute is arbitrable. In rejecting Towers' argument that the California order was not res judicata because the merits had not yet been decided, the Third Circuit stated:

> Although a trial on the merits has yet to take place, we do not believe that the finality of the order denying arbitration is affected. There were essentially two separate actions in the California trial court: TPFC's [Towers'] special proceeding to compel arbitration, and Brown and Riding's action for a

> declaratory judgment and damages. In our view, the special proceeding finally determined the merits therein, i.e., the arbitrability of the dispute. Once a dispute has been found not arbitrable, the issue of arbitrability should not arise again during proceedings on the merits. The finality of the order entered in the special proceeding is not undermined by the fact that the outcome of the dispute itself must be resolved by a separate action. See Cole v. BT & G, Inc., 141 Cal. App. 3d 995, 190 Cal. Rptr. 690 (1983) (order in special proceeding was a final judgment although merits of underlying dispute remained to be litigated in a separate action).

Id. at 349.

The district court erred in ruling that the prior petition to compel arbitration was res judicata of all the claims set forth in the second complaint. The portion of the IAM's second complaint in which it seeks an

order compelling arbitration was, however, properly dismissed on res judicata grounds.

IV. STATUTE OF LIMITATIONS

Aloha also contends that the IAM's second action is barred by the statute of limitations. This argument was raised below but the district court did not address it in its unpublished memorandum opinion. Although Aloha did not file a cross-appeal from the district court's ruling, we exercise our discretion to decide the statute of limitations question because it is a purely legal issue, the injection of which would not have caused the parties to develop new or different facts. See Donovan v. Crisostomo, 689 F.2d 869, 874 (9th Cir. 1982) (court heard and

decided statute of limitations issue which was raised in defendant's answer but was not considered by trial court; issue is one of law and requires no further factual development); see also Abex Corp. v. Ski's Enterprises, 748 F.2d 513, 516 (9th Cir. 1984) (whether Equal Access to Justice Act abrogates the priority of outstanding tax liens to allow attorneys' fees award to interpleader plaintiff is purely legal question which may be resolved on appeal even though not raised below).

A. UNIFORM FEDERAL STANDARD

The RLA does not contain a statute of limitations for actions such as the present combined claim for breach of the collective bargaining agreement and breach of the RLA's status quo provisions. Ordinarily,

when Congress has not expressly provided a statute of limitations governing actions based upon a federal statute, the courts may apply the most closely analogous state statute. United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 60 (1981) (citing Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 704-05 (1966)), overruled on other grounds, DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983).

In DelCostello v. International Brotherhood of Teamsters, the Supreme Court held that hybrid section 301/duty of fair representation claims under the Labor Management Relations Act (LMRA), 29 U.S.C. §§141-187 (1982), are to be

governed by a uniform federal limitations period. DelCostello, 462 U.S. at 171. The Court reasoned that state legislatures do not devise their limitations periods with national interests in mind, and noted that the lengthy state limitations periods analogous to duty of fair representation claims (i.e., the three to six year period applicable to legal malpractice claims in most states) would frustrate "the relatively rapid final resolution of labor disputes favored by federal law." Id. at 168 & n.18.

The Court concluded that a more analogous limitations period was the six-month period specified in section 10(b) of the NLRA, 29 U.S.C. §160(b) (1982), which governs the

bringing of an unfair labor practice charge before the National Labor Relations Board. DelCostello, 462 U.S. at 169. The Court opined that the need for national uniformity is greater in such a hybrid action than in an action for damages resulting from a breach of the collective bargaining agreement because a hybrid action involves "'those consensual processes that federal labor law is chiefly designed to promote -- the formation of the collective agreement and the private settlement of disputes under it.'" Id. at 162-63 (quoting Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966)). The Court found that the six-month limitations period specified in section 10(b) properly accommodated

the competing interests. DelCostello, 462 U.S. at 171.[2]

Every circuit which has addressed the question has held that the same policies which led the Court to adopt a federal limitations statute for hybrid claims brought under the LMRA apply with equal force to similar actions brought under the RLA, which governs labor-management disputes in common-carrier industries. See, e.g., Dozier v. Trans World Airlines, Inc., 760 F.2d 849, 851 (7th Cir. 1985); Linder v. Berge, 739 F.2d 686, 689 (1st Cir. 1984); Barnett v. United Air Lines, Inc., 738 F.2d 358, 363-64 (10th Cir.), cert. denied, 105 S.Ct. 594 (1984); Welyczko v. U.S. Air, Inc., 733 F.2d 239, 240 (2d Cir.), cert. denied, 105 S.Ct. 512 (1984);

Sisco v. Consolidated Rail Corp., 732 F.2d 1188, 1192-93 (3d Cir. 1984). Although this circuit has not yet addressed the question, see Klemens v. Air Line Pilots Ass'n, International, 736 F.2d 491, 499 n.7 (9th Cir.), cert. denied, 105 S.Ct. 435 (1984), we have indicated in dicta that the distinction between actions brought under the RLA and those brought under section 301 of the LMRA is "without import." Barina v. Gulf Trading & Transportation Co., 726 F.2d 560, 563 n.6 (9th Cir. 1984).

Although we recognize that the claim in the instant case is one step removed from a hybrid section 301/fair representation claim because it does not involve a claim for breach of the duty of fair representation, we

are persuaded that a combined claim for breach of the collective bargaining agreement and breach of the status quo provisions of the RLA bears a greater similarity to the hybrid claim at issue in DelCostello than it does to the straightforward breach of collective bargaining agreement claim alleged in Auto Workers v. Hoosier Cardinal Corp. Unlike the claim in Hoosier but like the claim in DelCostello, the instant claim involves an agreement to submit disputes to arbitration. See DelCostello, 462 U.S. at 162. Further, national uniformity is a more important concern in a case such as this which, like DelCostello, implicates the consensual processes which labor law was designed to

promote: it raises questions regarding the appropriate terms and conditions to be maintained under the RLA's status quo provisions during the negotiation of a new collective bargaining agreement. See id. at 162-63. Finally, as discussed in detail infra, section IV C, the present action more closely resembles an action founded upon violation of a federal statute than it does an action for breach of contract. Therefore, we believe that the Court's reasoning in DelCostello governs the case before us, and we conclude that federal law, not state law, is the source of the limitations period applicable to a combined claim for breach of the collective bargaining agreement and

violation of the RLA's status quo provisions.

There are two federal statutes of limitations which may apply to the instant case: the six-month period of section 10(b) of the NLRA or the two-year period provided in the RLA for suits challenging the decisions of the National Railroad Adjustment Board, 45 U.S.C. §153 First (r) (1982). Because the IAM's second action was filed more than six months but less than two years after Aloha gave notice that it would continue to implement the terms of the Interim Agreement, we must decide which federal limitations period governs. Cf. Linder v. Berge, 739 F.2d at 689 (declining to choose between two-year period and six-month

period because action was time-barred under either statute).

The IAM's suggestion that the applicable period is the two-year period specified in section 153 First (r) of the RLA is meritless. On its face, the two-year limitations period of section 153 is applicable only to actions to review an award of the National Railroad Adjustment Board (NRAB). Section 153 governs the establishment, composition, powers and duties of the NRAB, which has jurisdiction over disputes between common carriers and their employees. 45 U.S.C. §153 First (h). Subsection First (q) provides that employees or carriers aggrieved by the terms of an NRAB award or by the NRAB's failure to make an award in a dispute referred to

it, may file an action in federal court for review of the NRAB's order. Subsection First (r) of the statute provides: "All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after." (emphasis added).

Furthermore, the nature of judicial review of an NRAB order is very different from that appropriate to actions for breach of a federal statute. NRAB awards are reviewed under a narrow standard of review. See 45 U.S.C. §153 First (q); Union Pacific R.R. Co. v. Sheehan, 439 U.S. 89, 93 (1978) (per curiam). Where an NRAB award exists, the award provides

sufficient information for the reviewing court to exercise the requisite narrow scope of review. In contrast, the dispute in the instant case was never referred to the NRAB and no award was made. Indeed, the dispute was a major dispute concerning the formation of a collective bargaining agreement or efforts to secure new rights and incorporate them into future agreements, and binding arbitration was not available. IAM v. Aloha Airlines, Inc., 776 F.2d at 815-16; cf. Gordon v. Eastern Air Lines, Inc., 268 F. Supp. 210, 213 (W.D. Va. 1967) (two-year limitations period in section 153 of the RLA is applicable to airline industry dispute where dispute was a minor dispute already submitted to and resolved by

lthe System Board of Adjustment). Therefore, the two-year limitations period contained in section 153 of the RLA is not applicable to the instant action. See Sisco v. Consolidated Rail Corp., 732 F.2d at 1193-94 (two-year period in section 153 of the RLA is not applicable to duty of fair representation claim under RLA).

We agree with Aloha that the limitations period applicable to a combined claim for breach of the collective bargaining agreement and breach of the status quo provisions of the RLA is the six-month period contained in section 10(b) of the NLRA. In Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Railway Co., 768 F.2d 914 (7th Cir. 1985), the Seventh Circuit held that

an action for damages and injunctive relief based upon a combined claim for breach of the collective bargaining agreement and for breach of RLA §152 First (duty to bargain in good faith) and RLA §156 (obligation to provide advance notice of any unilateral change in working conditions), was governed by the six-month period in NLRA §10(b). Id. at 919. The court reasoned that because a refusal to bargain is a classic unfair labor practice, the analogy to section 10(b) is stronger than in a duty of fair representation case. Id. The court stated that although two different sections of the RLA were invoked in the complaint, they covered the same ground because a "refusal to bargain consists in unilaterally --that is,

without negotiations, without bargaining -- altering the collective bargaining agreement." Id. at 920. See also Robinson v. Pan American World Airways, Inc., 777 F.2d 84, 85-89 (2d Cir. 1985) (court found that the same considerations which led the Supreme Court to apply the section 10(b) time limitation to fair representation actions are involved in claim alleging discharge for pro-union activities, brought under RLA §2, Fourth).

The instant case likewise involves a refusal to bargain. Aloha refused to reinstate the terms of the Basic Agreement on the reinstatement date specified in the Interim Agreement without negotiations or bargaining. Therefore, the most

analogous federal limitations period is the section 10(b) period applicable to unfair labor practice charges.

B. RETROACTIVITY

The IAM contends that if we hold that the six-month limitations period contained in section 10(b) of the NLRA is applicable to actions such as the instant one, our decision should not be applied retroactively to bar the IAM's second complaint. We agree. In Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036, 1040-41 (9th Cir. 1983), cert. denied, 104 S. Ct. 1599 (1984), we held that DelCostello was not retroactively applicable to a hybrid section 301/fair representation action. We reasoned that retroactive application of a shorter statute of limitations

than that pertaining when the case was filed is inherently unfair, 719 F.2d at 1040, and after analyzing the case under the three-part test set out by the Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), we declined to apply DelCostello retroactively to Edwards. Id. at 1041; see also Barina v. Gulf Trading & Transportation Co., 726 F.2d 560, 563-64 (9th Cir. 1984) (DelCostello not retroactively applicable to suit by employee against employer to set aside arbitration award).

The complaint in the instant case was filed on March 9, 1984, nine months after DelCostello was decided on June 8, 1983. The retroactivity question in this case is thus not whether to apply DelCostello

retroactively, but whether to apply retroactively our holding in this case extending the DelCostello rationale to claims such as that in the instant case, for breach of the collective bargaining agreement and breach of the RLA's status quo provisions. Accordingly, we must evaluate the case in light of the three factors identified in Chevron Oil Co. v. Huson: (1) whether our decision establishes a new principle of law, (2) whether retroactive application will further or retard the purposes of the rule in question, and (3) whether applying our new decision will produce substantial inequitable results. Chevron Oil Co. v. Huson, 404 U.S. at 106-07.

As in Barina and Edwards, the first and third factors militate against retroactivity. Our decision establishes a new principle of law because it extends the rationale in DelCostello to cases arising under the RLA, a question which we have previously not addressed. The holding in this case also extends DelCostello's rationale to a case which is one step removed from a hybrid breach of collective bargaining agreement/fair representation action. It would be inequitable to impose a six-month limitations period on the IAM where it could not have known or foreseen our holding in the instant case.

Although the second Chevron Oil factor does favor retroactivity

because it promotes the prompt resolution of labor disputes, the strength of the considerations relating to the first and third factors outweighs those relating to the second factor in this case. See Barina, 726 F.2d at 564. Therefore, our conclusion concerning the applicable statute of limitations will not be applied retroactively to bar the IAM's second complaint.

C. THE APPLICABLE STATE LIMITATIONS PERIOD

Under the law in effect prior to our decision in this case, the timeliness of a suit for breach of a collective bargaining agreement was to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations. See United Parcel Service, Inc. v.

Mitchell, 451 U.S. at 60; Auto Workers v. Hoosier Cardinal Corp., 383 U.S. at 704-05; Edwards v. Teamsters Local Union No. 36, 719 F.2d at 1038.

The parties disagree as to whether the most closely analogous state statute is the one-year period contained in Hawaii Rev. Stat. §657-11 (governing recoveries authorized by federal statute) or the six-year period contained in Hawaii Rev. Stat. §657-1(1) or (4) (governing actions for the recovery of a debt founded upon a contract and residual types of actions). We agree with Aloha that the one-year period contained in Hawaii Rev. Stat. §657-11 is most analogous, although not for the reasons which Aloha asserts. Aloha erroneously labels as dispositive this

court's unpublished affirmance of a district court's pre-DelCostello ruling that section 657-11 applies to hybrid breach of collective bargaining agreement/fair representation claims under the RLA. Our affirmance in Hafer v. Air Line Pilots Association, International, 525 F. Supp. 874 (D. Hawaii 1981), aff'd mem., 698 F.2d 1230 (9th Cir. 1983), was an unpublished disposition which has no precedential value and may not be cited to or by this court. 9th Cir. R. 21(c).

Aloha's reliance upon the Supreme Court's recent decisions in Wilson v. Garcia, 105 S. Ct. 1938 (1985) and Springfield Township School District v. Knoll, 105 S. Ct. 2065 (1985) is similarly misplaced. These

cases are wholly inapposite because they arose in the context of section 1983 actions and do not purport to address the question of the limitations period applicable to a dispute for breach of a collective bargaining agreement.

Nevertheless, Aloha correctly argues that the gravamen of the IAM's complaint centers around Aloha's refusal to reinstate the benefits and working conditions which it contends represent the status quo under the RLA. This obligation is founded upon the status quo provisions of the RLA (sections 155 and 156) rather than upon the collective bargaining agreement itself. See United Transportation Union v. Florida East Coast Railway Co., 586 F.2d 520, 527

(5th Cir. 1978) (per curiam) (action alleging violation of RLA through refusal to restore status quo was action upon a liability created by statute, and state statute of limitations period for such actions applied). Therefore, the most closely analogous state limitations period is the one-year period contained in Hawaii Rev. Stat. §657-11 governing recoveries authorized by federal statute.

The IAM argues that even assuming that section 657-11 applies, its second complaint was timely filed because a cause of action for breach of contract does not accrue under Hawaii law until the plaintiff disaffirms the contract. The IAM concludes that because Aloha did not

disaffirm the interim agreement until October 31, 1983, when a new collective bargaining agreement was reached, its complaint (filed March 9, 1984) was filed within one year of the accrual of its claim. Alternatively, the IAM argues that (1) Aloha continued to violate its rights each time it issued paychecks which were lower than the status quo rate; or (2) the running of the statute was tolled until June 24, 1983, the date on which Aloha refused to arbitrate the dispute.

The IAM's first contention misses the mark. As discussed supra, its action cannot be likened to a breach of contract claim. Rather, the IAM's claim is a federal claim for violation of the RLA. "The question

of when a federal cause of action 'accrues' and the related question of whether it is 'tolled' by subsequent events, are federal questions." Butler v. Local Union 823, 514 F.2d 442, 448-49 (8th Cir.), cert. denied, 423 U.S. 924 (1975), disapproved on other grounds, IBEW v. Foust, 442 U.S. 42 (1979).

Nor is there any merit to the IAM"s contention that Aloha's refusal to reinstate the status quo constituted a continuing violation. The fact that a party violating the RLA persists in its position or that the effects of its actions continue after the claim initially arose does not create a continuing violation so that the statute of limitations is re-started with each action. See

United Transportation Union v. Florida East Coast Railway Co., 586 F.2d at 527 (employer's refusal to restore status quo and decision to implement new rates of pay did not create continuing violation of RLA so that limitations period was re-started with issuance of each paycheck); see also Harper v. San Diego Transit Corp., 764 F.2d 663, 669 (9th Cir. 1985) (fact that union continually failed to pursue employee's grievance does not constitute a continuing breach of its duty of fair representation so that statute of limitations is re-started).

The IAM's tolling argument, however, does have merit. In the analogous context of breach of contract/breach of duty of fair representation claims, the Eighth

Circuit has held that the statue of limitations is tolled (or the cause of action does not accrue) until the employee has exhausted the grievance process and his grievance has been rejected. Butler v. Local Union 823, 514 F.2d at 449-50. The court reasoned that "the underlying policies of federal labor law will not be furthered by enmeshing §301 breach of contract actions in technicalities that operate to the disadvantage of plaintiffs who have acted entirely in good faith in following the contract's command that they first submit their grievance to the arbitration process." Id. at 450; see also Smart v. Ellis Trucking Co., 580 F.2d 215, 219 n.5 (6th Cir. 1978) (litigants should not be penalized for complying

with federal labor policy requiring that section 301 plaintiff seek arbitral relief as a prerequisite to federal claim), cert. denied, 440 U.S. 958 (1979).[3]

In the instant case, the IAM pursued its grievance in good faith under the arbitration process set forth in the collective bargaining agreement.[4] When Aloha refused to arbitrate, the IAM sought an order compelling arbitration. When that order was denied, the IAM filed this action for adjudication of the merits of the dispute. It would be inequitable to penalize the IAM for its attempt to utilize the arbitration machinery of the collective bargaining agreement. Therefore, the IAM's cause of action under the RLA did not accrue

until Aloha refused to arbitrate on June 24, 1983. The complaint was filed on March 9, 1984. That date is less than one year after June 24, 1983. Therefore, the IAM's action was timely filed.[5]

V. CONCLUSION

We hold today that the uniform federal limitations period for the bringing of unfair labor practice charges contained in section 10(b) of the NLRA governs combined claims for breach of the collective bargaining agreement and breach of the RLA's status quo provisions. Because it would be inequitable to impose retroactively on the IAM a six-month limitations period where the previously applicable period would have been twice as long in duration,

we decline to apply to the IAM's action our determination that a federal six-month limitations period is applicable to combined actions for breach of the collective bargaining agreement and violation of the RLA's status quo provisions.

The IAM's complaint is not time-barred under the law applicable prior to our decision in this case. The most closely analogous state limitations period is the one-year period specified in Hawaii Rev. Stat. §657-11. The IAM's cause of action accrued on June 24, 1983, the date on which Aloha refused to arbitrate. The IAM's complaint was filed on March 9, 1984, within one year from the date of the accrual of its claim. Therefore, the IAM's complaint was timely filed.

The district court's judgment is affirmed insofar as it holds that the IAM's request for an order compelling arbitration is precluded by res judicata principles. The district court's judgment is reversed insofar as it concludes that the IAM's complaint seeking to litigate the merits of the status quo applicable during negotiation of a new collective bargaining agreement is barred by res judicata principles. The district court is directed, however, to consider the possibility of consolidating the instant action with the unresolved counterclaim remaining in the first action.

AFFIRMED IN PART, REVERSED IN PART.

FOOTNOTES

[1] A dispute which concerns the formation of a collective bargaining agreement or efforts to secure new rights and incorporate them into future agreements is a "major dispute" over which the federal courts have jurisdiction. Elgin, Joliet & Eastern Railway v. Burley, 325 U.S. 711, 723 (1945), aff'd on rehearing, 327 U.S. 661 (1946); IAM v. Aloha Airlines, Inc., 776 F.2d 812, 815 (9th Cir. 1985). A "minor dispute" concerns the interpretation or application of a collective bargaining agreement and is resolved through the compulsory arbitration procedures established by the RLA. Id.

[2] In Hoosier the Court had previously held that a section 301 action by a union for damages caused by a breach of an employer's obligation embodied in a collective bargaining agreement was governed by the state statute of limitations applicable to breach of contract actions. 383 U.S. at 704-05 & n.7. The Court refused to adopt a uniform limitations provision for section 301 suits, reasoning that lack of uniformity in the area of the enforcement of contractual rights would not interfere with the process of negotiating a labor agreement or of privately settling employee disputes under the agreement. Id. at 702. In DelCostello, the Supreme Court stressed that its holding "should not

be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere," and stated that "resort to state law remains the norm for borrowing of limitations periods." 462 U.S. at 171. Thus, under Hoosier state statutes of limitations for breach of contract continue to apply to straightforward section 301 actions by unions for damages caused by breach of a collective bargaining agreement.

[3] Unlike the instant case, neither Butler nor Smart involved a claim primarily founded upon a statutory violation; the claims in both cases were grounded in the collective bargaining agreement. Nevertheless, the equitable tolling doctrine which the Eighth and Sixth Circuits employed to avoid penalizing the litigants for exhausting their arbitral remedies under their collective bargaining agreements is applicable in the instant case because until June 24, 1983, the IAM believed that its claim was a minor dispute primarily founded upon the collective bargaining agreement and thus was arbitrable. Although on March 10, 1983 Aloha asserted that the dispute was not grievable, it was not until June 24, 1983 that Aloha spelled out the detail of its position that the IAM's complaint was a major dispute litigable in the federal courts.

The IAM's belief that the instant case presented a minor dispute was reasonable as a matter of law. Contrary to Aloha's contentions, the law was far from clear regarding whether the determination of the status quo under the RLA was a major dispute involving an interpretation of the Act or a minor dispute implicating an interpretation of the parties' collective bargaining agreement. In the predecessor case to the instant appeal, another panel of this court noted that "the IAM's argument [that this was a minor dispute] has intuitive appeal." IAM v. Aloha Airlines, 776 F.2d at 816. Although the panel ultimately concluded that a determination of the status quo is a major dispute over which the federal courts have jurisdiction, see id., it considered the question to be sufficiently novel to warrant publication.

We note that the application of the tolling doctrine to future actions of this type will be extremely limited. In light of our decision in IAM v. Aloha Airlines, Inc., 776 F.2d 812 that the determination of status quo under the RLA is a major dispute which is not arbitrable, a party in the IAM's position can no longer contend in good faith that its grievance relating to status quo is arbitrable. Thus, pursuit of arbitral remedies available under a collective bargaining agreement would not operate to toll the statute of limitations on

a status quo claim under the RLA accruing after the date of our decision in IAM v. Aloha Airlines, Inc., 776 F.2d 812. See International Union of Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229, 238 (1976) (filing of grievance under collective bargaining agreement does not toll limitations period applicable to statutory claim of racial discrimination before the Equal Employment Opportunity Commission).

[5] Aloha contends that a remand to the district court is required in order to develop the facts concerning the IAM's four-month delay in filing this action following the district court's October 25, 1983 grant of partial summary judgment in Aloha's favor in the prior lawsuit. We disagree. Under the unique circumstances of this case, application of the equitable tolling doctrine presents a question which we are able to resolve as a matter of law: whether the IAM's belief that the instant case presented a minor dispute was reasonable under then-existing case law. In light of our conclusion that the IAM's cause of action did not accrue until June 24, 1983, filing would have been timely until June 24, 1984; any delay in filing within that period is irrelevant.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,	)	NO. 84-2693
	)	DC CV 84-0239
Plaintiffs-Appellants,	)	
v.	)	
ALOHA AIRLINES, INC.,	)	
Defendant-Appellee.	)	

APPEAL from the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in part; reversed in part.

Filed and entered February 6, 1986.

A TRUE COPY
ATTEST JUNE 4, 1986
CATHY A. CATTERSON
Clerk of Court
By Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,	)	CIVIL NO. 84-0239
Plaintiff,	)	
v.	)	
ALOHA AIRLINES, INC.,	)	
Defendant.	)	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DENYING MOTION FOR SANCTIONS

The defendant's Motion to Dismiss and for Sanctions came on for hearing on September 4, 1984. Herbert R. Takahashi appeared on behalf of the plaintiff. Messrs. Robert Katz and Richard Rand of Torkildson, Katz, Jossem & Fonseca appeared on behalf of

the defendant. The court, having considered the defendant's Motion to Dismiss and for Sanctions, having reviewed the memoranda in support and in opposition thereto, as well as the arguments of counsel, and being fully apprised of the premises therein, finds as follows:

FINDINGS OF FACT

On or about December 6, 1979, the International Association of Machinists and Aerospace Workers ("IAM") and Aloha Airlines, Inc. ("Aloha") entered basic labor agreements which covered July 1, 1979 through December 31, 1981.

On or about April 2, 1982, IAM and Aloha agreed to interim amendments to the basic collective bargaining agreements for

IAM-represented employees, which would be applicable from April 2, 1982 to February 28, 1983 only. Those amendments included setting an 8 1/2 hour workday, cutbacks of wages and vacation benefits. That interim agreement specifically stated that, on March 1, 1983, the parties would revert back to the original agreement. Further, on April 20, 1982, the interim agreement was incorporated in the basic agreement, with a provision that the interim agreement would not be construed as a change in the basic agreement after March 1, 1983.

On or about February 11, 1983, Aloha advised all department heads, managers, supervisors, and the IAM that the April 2, 1982 interim

agreement would continue in effect beyond March 1, 1983.

IAM rejected Aloha's position. Grievances were filed under both clerical and mechanical contracts. The grievances were processed in accordance with the procedure under the basic contracts, with a four-step grievance procedure, culminating in arbitration through a System Board of Adjustment. The parties deadlocked at step 4; IAM requested that Aloha select an arbitrator, in light of the deadlock, and pursuant to the basic agreement; Aloha refused to arbitrate the dispute.

Aloha continued to operate under the imterim terms until October 31, 1983.

Effective November 1, 1983, IAM and Aloha entered into an agreement amending the basic agreement, but not establishing the terms of pay, vacation benefits and hours of work for the disputed period--March 1, 1983 through October 31, 1983.

IAM alleges that Aloha's behavior violated the collective bargaining agreement, and violated 45 U.S.C. §152, 29 U.S.C. §§152, 155, 156, 181. Further, the IAM argues that it was an unlawful modification of the terms of the contract, under 45 U.S.C. §152. In addition, it argues that Aloha's behavior subverted IAM's standing as a collective bargaining agent, under 29 U.S.C. §152. Moreover, the IAM alleges economic

loss to the employees, and violation of the employees' rights uner 45 U.S.C. §152.

IAM seeks damages, a declaration that Aloha has violated the terms of the collective bargaining agreement, an order that Aloha must arbitrate the dispute, and attorney's fees and costs.

On July 27, 1983, plaintiff filed a motion to compel compliance with agreement to arbitrate in the First Circuit Court of the State of Hawaii. Defendant Aloha removed the petition to federal court (Civ. No. 83-797 in this court), on the grounds that it arose under the Railway Labor Act. Defendant Aloha's motion for summary judgment came on for hearing

on September 1, 1983 before Judge Charles Hardy.

On October 17, 1983, Judge Hardy entered an order granting Aloha's motion; he ruled that Aloha need not arbitrate a grievance filed by the IAM concerning Aloha's continued implementation of certain rules, rates of pay and working conditions after March 1, 1983, while the parties were still negotiating a new agreement. Judge Hardy explained that the issues of what were to be the rules, rates of pay, and working conditions during the period after which the collective bargaining agreement had expired and before the parties reached a new agreement was a federal issue of law to be determined by reference to the RLA, and not the

parties' expired agreements. Thus, he found, the issue was not arbitrable.

Judge Charles Hardy addressed this issue in a case brought under the same fact situation as is currently before the court. He held that IAM could not obtain an order compelling arbitration. That order is currently on appeal to the United States Court of Appeals for the Ninth Circuit.

CONCLUSIONS OF LAW

Aloha seeks dismissal of the current action on the grounds that res judicata prevents this court from considering the IAM's current complaint. In response, IAM argues that Judge Hardy's ruling is not final, nor on the merits.

The parties's dispute concerns the applicability of "claim

preclusion" to this action. Under the doctrine of claim preclusion, any litigation on a matter is foreclosed because of the court's determination that it should have been advanced in an earlier lawsuit. The general rule of claim preclusion is that a valid and final judgment on a claim precludes a second action on that claim or any part of it.

For claim preclusion to apply, the judgment must be final, see Restatement (Second) of Judgments, §13 (1982), but an otherwise final judgment of a trial court is generally regarded as final in federal courts even though an appeal from it is pending. See Reed v. Allen, 286 U.S. 191 (1932); Restatement (Second) of Judgments §13 & comment f 91982).

Claim preclusion applies where there has been an opportunity to reach the merits in the first lawsuit. See Restatement (Second) of Judgments §19 & comment a. Claim preclusion applies "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." Cromwell v. County of Sac, 94 U.S. 351 (1877). That is, claim preclusion acts to extinguish claims by a plaintiff even though the plaintiff is prepared in the second action to present evidence or grounds or theories of the case not presented in the first action, or to seek remedies or forms of relief not demanded in the

first action. See, e.g., Constantini v. Trans World Airlines, 681 F.2d 1199 (9th Cir. 1982).

The court, having considered the copy of Judge Hardy's order that has been filed in this case (as exhibit B to defendant's motion to dismiss), finds that it is a judgment on the merits for the purposes of claim preclusion. After addressing the plaintiff's claim, Judge Hardy specifically ruled that the parties' dispute was not arbitrable under the Railway Labor Act. He ruled that the rules, rates of pay, and working conditions that were in effect prior to the dispute must continue in effect until the parties reach a new agreement, or the services of the National Mediation Board were

terminated in accordance with 45 U.S.C. §155 and the 30-day cooling-off period provided by the Railway Labor Act has expired. See Detroit and Toledo Shoreline Railroad Co. v. United Transportation Union, 936 U.S. 142 (1969).

Because this case is brought pursuant to the court's jurisdiction over federal questions, and not under the court's diversity jurisdiction, the court shall apply the federal rule concerning finality of judgment. Pursuant to the holding of Reed v. Allen, 286 U.S. 191 (1932), the court finds that, under the federal rule, the pendency of an appeal does not suspend the operation of a judgment where, as is the case here, the appeal is not by trial de novo. Thus, it is

clear that the appeal to the Ninth Circuit of Civ. No. 83-797 does not prevent the order from being a final order. Judge Hardy's October 17, 1983 order was a final order.

The court must consider whether the parties and the issues in the two cases are the same. The court finds that the IAM has represented all employees in both the craft or class of mechanics and the craft or class of clerical employees with respect to its disputes with Aloha. The parties whose claims arose, as well as those whose claims IAM could have raised in the earlier action are bound by Judge Hardy's order.

Further, the court finds that the cases involve the identical issue--whether IAM's dispute with

Aloha should be arbitrated. Judge Hardy clearly issued an order governing that issue.

Because the doctrine of res judicata controls the issues in this case, IT IS HEREBY ORDERED that defendant Aloha Airlines's Motion to Dismiss be, and the same is, GRANTED. The dismissal shall be with prejudice.

Because the court finds that the filing of the complaint was not done in bad faith, was not brought for the purposes of harassment, delay or to increase the cost of litigation, the court finds that the complaint was not filed in violation of Rule 11 of the Federal Rules of Civil Procedure. Thus, IT IS HEREBY ORDERED that defendant's Motion for Sanctions be, and the same is, DENIED.

Because the court has ruled that this action is barred by teh doctrine of res judicata, and has granted the defendant's Motion to Dismiss on that ground, it does not reach the statute of limitations issue argued by the parties.

SO ORDERED.

DATED: Honolulu, Hawaii, October 17, 1984.

/s/ Harold M. Fong
UNITED STATES DISTRICT JUDGE